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LETTER DATED 16 FEBRUARY 1993 FROM THE PERMANENT REPRESENTATIVE OF ITALY TO THE UNITED NATIONS ADDRESSED TO THE SECRETARY-GENERAL

I have the honour to forward herewith a draft statute of a Tribunal for War Crimes and Crimes against Humanity Committed in the Territory of the Former Yugoslavia, together with some explanatory notes.

The said documents are the result of a study carried out by a Commission of Italian jurists, chaired by Professor Giovanni Conso, former President of our Constitutional Court, and currently Minister of Justice, which was set up by the Italian Government for the purpose.

The Italian project is intended as a contribution to the present debate concerning the establishment of an international penal jurisdiction for crimes committed in the former Yugoslavia.

I would, therefore, be grateful if you could have the project circulated as a document of the Security Council.

(Signed) Vieri TRAXLER
Ambassador

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Annex I

[Original: English and French]

Commission on War Crimes and Crimes against Humanity Committed in the Former Yugoslavia: Statute of the Tribunal for War Crimes and Crimes against Humanity Committed in the Territory of the Former Yugoslavia

Article 1

Jurisdiction of the Tribunal

1. The Tribunal shall have jurisdiction on crimes referred to in article 4 committed in the territory of the former Yugoslavia after 25 June 1991.

2. The Tribunal shall also have jurisdiction on the same crimes when committed in places not subject to the sovereignty of any State, when the offender or the victim is a national of one of the States born from the dissolution of the former Yugoslavia.

Article 2

Structure of the Tribunal

The Tribunal shall comprise the following bodies:

(a) The Court;

(b) The Prosecutor's Office;

(c) The Registry.

Article 3

Concurrence of jurisdiction (Ne bis in idem)

1. The Tribunal's jurisdiction is not precluded by any criminal proceedings pending for the same acts before a national judicial authority. However, the Court, meeting in plenary session, can, upon request of the Prosecutor's Office or of the defender of the accused, waive its own jurisdiction in favour of the judicial authority of the State in whose territory the act has been committed or of the State of which the author of the crime or the victim has the nationality, when it considers that such authority guarantees acceptable conditions for an independent and impartial justice, and that waiver of jurisdiction is in the interest of justice.

2. When a final judgement has been delivered by the Court, an accused person shall not be submitted to another trial by a national judicial authority for the same acts, however differently qualified, provided that, in case of condemnation, the penalty has been purged or its purging is under way or the penalty has been extinguished.

3. When enforcing penalties imposed by the Court, the relevant authority shall take into account penalties that have been imposed for the same acts by a national judicial authority and which have already been executed.

Article 4

Crimes subject to the jurisdiction of the Tribunal

The following crimes are subject to the jurisdiction of the Tribunal:

(a) War crimes, such as violations of the Geneva Conventions of 12 August 1949 and of the Additional Protocols of 10 June 1977, as well as any other war crime as defined by international customary law or by international treaties;

(b) Crimes of genocide, in violation of the Convention on the Prevention and Punishment of the Crime of Genocide, opened for signature in New York on 9 December 1948;

(c) Crimes against humanity consisting of systematic or repeated violations of human rights, such as wilful murder and deliberate mutilation, rape, reducing or keeping persons in a state of slavery, servitude or forced labour, or persecuting or heavily discriminating against them on social, political, racial, religious or cultural grounds; or deporting or forcibly transferring populations;

(d) Acts of torture, in violation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment signed in New York on 10 December 1984.

Article 5

Principles of criminal liability

1. The official status of the author of any of the crimes referred to in article 4, and particularly the fact of having acted in the capacity of head of State or member of the Government, does not exclude criminal liability.

2. The fact that the author of one of the crimes referred to in article 4 may have acted on the orders of a Government or of a hierarchical superior does not exclude criminal liability if, given the circumstances at the time of the offence, the offender had the possibility to disregard such orders.

3. The fact that one of the crimes referred to in article 4 is committed by a subordinate does not exclude the hierarchical superiors from criminal liability, if they knew, or were in possession of information which would have enabled them to conclude, in the circumstances of the moment, that the subordinate was committing, or was about to commit, the crime or if they had failed to take every possible measure to prevent its commission.

Article 6

Plurality of offenders

The fact of instigating the commission of any of the crimes referred to article 4 or of being an accomplice thereto or of agreeing to the commission of the crimes, shall be punished according to the provisions of article 7.

Article 7

Penalties

1. For the crimes referred to in article 4, the Court shall apply the penalties provided for by the criminal law in force at the time of commission in the State in whose territory the crime was committed.

2. If the crime is committed in a place not subject to the sovereignty of any State, the Court shall apply the penalties provided for by the criminal law in force at the moment of its commission in the State born from the dissolution of the former Yugoslavia of which the offender is a national or, subordinately, of which the victim is a national.

3. In no case, however, may the death penalty be inflicted.

Article 8

The Court

1. The Court shall examine the substance of the charges made by the Prosecutor and ascertain the guilt or the innocence of the accused person. In case of a conviction, the Court shall inflict the relevant penalties.

2. The Court shall consist of eighteen members, two each being appointed by the Presidents or Chairmen of the International Court of Justice, the European Court of Human Rights, the Human Rights Committee (Civil and Political), the Committee on the Elimination of Racial Discrimination, the Committee against Torture, the European Committee for the Prevention of Torture, the Committee on the Elimination of Discrimination against Women, the Committee on the Rights of the Child.

3. The members of the Court shall be persons of recognized competence in the field of international criminal law and human rights, offering guarantees of full independence. The Court cannot include more than one member having the same nationality.

4. In its first session, the Court elects its President. In case of a tied vote, the senior candidate shall be elected.

5. The Court shall comprise at least three Chambers, one of which as a Chamber of guarantee (Chambre d'accusation) and another one as a Judge of appeal. Each Chamber shall consist of three members. In plenary session the Court sits in a Chamber of seven members. The Chamber of guarantee meets to confirm measures of precuationary detention. It holds also the preliminary hearing whose function is to verify whether the Prosecutor's request for dismissing the charges or for prosecuting are adequately motivated.

6. The Court has its seat at ...

Article 9

The Prosecutor's Office

1. The Prosecutor's Office is responsible for investigating the information on crimes which it has received or acquired ex officio or on denunciation. It avails itself of the police forces of the State in which inquiries are being conducted or of any other structures as provided for in article 14.2. At the end of the investigations, the Prosecutor's Office shall request the Tribunal to dismiss the charges or shall proceed to prosecute, pursuant to article 8.5.

2. Non-governmental organizations working in the humanitarian field or in the field of human rights, having a consultative status or being accredited with the United Nations or the Council of Europe can submit documented denunciations to the Prosecutor's Office.

3. Any request to dismiss charges together with its grounds shall be communicated to the organization which has submitted the denunciation. The organization can submit to the Chamber of guarantee of the Court its observations thereon.

4. The Prosecutor's Office consists of thirty-six members, four each to be appointed by the persons referred to in article 8.2 and under the conditions provided by article 8.3. No more than two members of the Prosecutor's Office may be of the same nationality.

5. The members of the Prosecutor's Office shall elect the General Prosecutor from among them, who shall be responsible for the Office. In the case of a tied vote, the senior candidate shall be elected.

6. The Prosecutor's Office has its principal seat in the place where the Court has its seat. Sub-offices may be established in the countries where inquiries are held.

Article 10

The Registry

1. The Registry is responsible for the administration, financial affairs and organization of the Tribunal, with separate offices in the Court and the Prosecutor's Offices.

2. The Registry is located in the place where the Court has its seat.

Article 11

Principles of proceedings

1. Every person who is charged with a crime under article 4 has the right:

(a) To be presumed innocent until found guilty by the Court, excluding therefore any restraint of personal freedom not justified by needs of precaution; should this be the case, the Prosecutor's Office shall immediately ask a confirmation to the relevant Chamber of the Court;

(b) To be immediately informed, in a language he understands and with full explanations, of the nature and grounds of charges addressed against him and in case of precautionary measures, of the reasons for his seizure;

(c) To have sufficient time and to benefit from the resources, for preparing his defence, with the right to communicate with a lawyer of his choice, all the costs of which shall be paid in the event that the accused is unable to meet them;

(d) To be judged within a reasonable period of time at a public hearing, appearing personally and being represented by a counsel chosen by him as provided for by (c) above or by a defence counsel appointed by the Court;

(e) To be assisted free of charge, when he does not know the language used at the trial, by an interpreter to enable him to understand the proceedings in which he is personally involved, all the written trial documents being translated in advance;

(f) To question or to have questioned all the witnesses for the prosecution, requesting a confrontation with them if necessary, and to request witnesses for the defence to be cross-examined and to appear and be questioned under the same conditions as the witnesses for the prosecution;

(g) To avail himself of the right to remain silent after having been duly informed of this right;

(h) Not to have any evidence acquired unlawfully, whether directly or indirectly, used against him.

2. In any case adequate protection shall be ensured for witnesses and persons injured by the crime against any form of intimidation or pressure.

3. The Court, in its General Assembly, having heard the Prosecutor, when adopting the Tribunal's rules, shall also dictate rules necessary in order to implement in the various phases of proceedings the principles under numbers 1 and 2.

Article 12

Appeals

Appeals against judgements delivered by any Chamber of the Court may be lodged before the Appeals Chamber of the same Court. The judges who were members of the bench during the previous proceedings may not hear the appeal.

Article 13

Res judicata and revision

1. Judgements against which no appeal is lodged and judgements delivered on appeal shall be considered final, and become enforceable. However, if evidence unknown at the time of the judgement comes to light, the Court may decide, on request, whether the new evidence justifies acquitting the convicted person or shows that the offence was not a crime pursuant to article 4. When ascertaining one or the other occurrence the enforcement of the penalty shall be suspended and the conviction quashed.

2. At the revision hearing, the Court judges in plenary session and none of the judges on the bench which have intervened in previous proceedings may hear the appeal.

Article 14

Enforcement

1. The enforcement of the sentences of the Court shall be the responsibility of the Prosecutor's Office.

2. Unless the Court decides otherwise, it is primarily the responsibility of the competent organs of the State in whose territory the crimes are committed

to enforce precautionary measures and penalties inflicted by the Court. The modalities of the supervision of the enforcement are indicated by the rules referred to in article 11.3.

3. The Security Council of the United Nations adopts any appropriate measures for the effective implementation of the provisions of the present statute.

Annex II

[Original: English and French]

Explanatory notes to the draft statute of an international Tribunal

This draft is based on the assumption that the Tribunal is set up by a resolution of the Security Council, adopted under Chapter VII of the Charter of the United Nations, as an independent and autonomous United Nations body, governed by a statute which would take the form of an annex to the Council's resolution.

Due to the independence and autonomy of the Tribunal, it is up to it to equip itself with the necessary rules of procedure.

On the other hand, it is up to the Security Council, possibly within the scope of the same resolution, to request States Members or not members of the United Nations to make the necessary provisions for the concrete operation of the Tribunal. Reference is made here to provisions in the field of extradition and legal assistance to the Tribunal; detention of people under investigation; means for enforcement of penalties as well as precautionary measures, etc. Reference is also made to financial provisions.

Article 1

Jurisdiction of the Tribunal

The Tribunal shall have jurisdiction over the crimes envisaged under article 4, where committed in former Yugoslavia. On the basis of the principle of territorial jurisdiction, any crime committed outside the territory of the former Yugoslavia shall be judged by the State of the locus commissi delicti. In fact, crimes indicated under article 4 and related to the present conflict can hardly be perpetrated outside the former Yugoslavia.

Relevance shall be given to the nationality of the offender or of the victim to decide upon the court jurisdiction, when the act is committed in an area which is not subject to the sovereignty of any State.

The Tribunal shall have jurisdiction only over the crimes committed after 25 June 1991, the date on which Croatia and Slovenia were proclaimed independent.

Article 2

Structure of the Tribunal

The Tribunal shall be organized in three entities, in charge respectively of judging, prosecuting and supporting the proceedings; for further details see articles 8, 9 and 10.

Article 3

Concurrence of jurisdiction (Ne bis in idem)

According to the Commission, there must be a trade-off between the "ne bis in idem" principle (which is the expression of a fundamental human right) and the need to give priority to the international Tribunal.

As a result, the following decision has been reached:

(a) The jurisdiction of the Court shall not be questioned by pending criminal proceedings for the same facts before a national jurisdiction;

(b) The Court, in joint session (see art. 8), shall be able to waive its jurisdiction in favour of a national judicial authority competent on the basis of the principle of territoriality, or of those of active or passive personality, provided that such jurisdiction be independent and impartial and that this waiver be desirable in the interest of justice. This will allow the Court to take a discretional decision and to transfer to the national judicial authority the cases that do not need to be dealt with by an international jurisdiction because they are of modest dimension or because, in general, the national authority can best judge them;

(c) The irrevocable judgement of the Court shall produce a preclusive effect vis-à-vis any domestic criminal case;

(d) For equity's sake, one shall take into consideration penalties inflicted by a national jurisdiction for the same crime and already served; this is a solution based on the principle of "proportionality" as applied by the European Community Court of Justice (see, for example: Wilhem vs Bundeskartellamt).

Article 4

Crimes subject to the jurisdiction of the Tribunal

In determining war crimes and those against humanity falling within the jurisdiction of the Tribunal, reference has been made to the international crimes on which there is a general consensus, as reflected by widely acknowledged principles of international law (e.g. the Nürnberg principles) or in universally accepted conventions.

Among war crimes under the jurisdiction of the Court (subpara. (a)) the serious violations of the 1949 Geneva Conventions and of the Additional Protocols were included as the historically most significant part of humanitarian law.

It was also deemed appropriate to add a reference to war crimes stemming from other provisions of international customary and conventional law so as to take into account further kinds of violations, on the basis of the most recent developments of humanitarian law (suffice it to recall the violations of the Hague Convention of 14 May 1954 on the Protection of Cultural Heritage in the Event of Armed Conflict).

Subparagraph (b) considers genocide according to the definition set forth in the United Nations Convention of 1948; in fact, genocide is the most heinous among crimes against humanity; it was given specific attention and defined as a "crime under international law" in General Assembly resolution 96 (I) of 11 December 1946 and subjected to the jurisdiction of an international criminal Court (never implemented by the way) by the 1948 Convention.

Subparagraph (c) concerns the most serious human rights' violations, according to the wording of article 21 of the Draft Code of Crimes against the Peace and Security of Mankind; moreover, it was deemed necessary to add maiming and rape to the crimes envisaged in the above-mentioned article, because these are crimes very frequently committed in the present conflict, causing a public outcry. Also serious discriminations out of social, political, racial, religious or cultural reasons were added since they are violations of the United Nations Convention on the Elimination of All Forms of Racial Discrimination, opened to signature in New York on 7 March 1966. Instead, the reference to "crimes against mankind" in the wording of the Nürnberg Tribunal statute was considered obsolete, in that it envisaged a link with a war crime, thus largely restricting the scope of action of the Court to be set up.

Subparagraph (d) considers torture according to the definitions provided by the United Nations Convention. These offences are already included among war crimes; in particular, torture is mentioned under article 147 of the Fourth Geneva Convention.

Further reference to other international crimes should be carefully assessed, in order not to mention crimes on which no general consensus exists.

Article 5

Principles of criminal liability

Article 5 envisages some important principles governing criminal liability for international crimes that have been universally transposed into international criminal law, like the Nürnberg principles and some of the most recent international conventions.

The first section rules out any form of immunity for the act of State; it is a principle which has a precedent in the Convention on the Prevention and Punishment of the Crime of Genocide and which is by now accepted by the most recent trends in international criminal law.

The exclusion of the exception related to orders by hierarchical superiors, envisaged under paragraph 2 is applicable only when the subordinate has concretely had the possibility not to obey them.

The principle of hierarchical superiors' liability for war crimes or crimes against humanity - explicitly provided for under paragraph 3 - is also found in the international case law and transposed into article 86 of the First Additional Protocol to the Geneva Conventions.

Article 6

Conspiracy to commit the crime

All international criminal law texts explicitly refer to penalties for certain forms of complicity in committing the crime. As a result, the draft statute includes a provision punishing complicity, instigation and conspiracy to commit the crime.

Article 7

Penalties

All war crimes and those against humanity provided for under article 4 are considered international crimes as set forth by international law or far-ranging conventions. However, these international law sources do not envisage any penalties for such crimes; the need to respect the principle "nullum crimen, nulla poena sine lege", the basis of fundamental human rights, has induced the Italian Commission to decide in favour of the penalties set forth by the criminal law of the State of the locus commissi delicti (according to paragraph 1 of article 1, reference is inevitably to one of the States resulting from the dissolution of the former Yugoslavia).

If the principle is inapplicable (because the crime has been committed in a place which is not subject to the sovereignty of any State), recourse shall be made to the principle of active or passive personality in order to determine the law to be enforced.

Nevertheless, the death penalty has been excluded, in line with a principle that is by now part of the European legal heritage, as shown by Additional Protocol No. 6 to the European Convention on Human Rights.

Article 8

The Court

After a brief indication, in paragraph 1 of the main competence of the Court, its composition is spelled out hereinafter so as to:

(a) Use or enhance the existing ad hoc international bodies designed legally and politically to safeguard human rights world wide and in the European region (i.e. the United Nations and the European regional subsystem of human rights);

(b) Create synergy between these agencies to ensure impartiality and, at the same time, effectiveness of the Tribunal.

The bodies referred to are all "composed by individuals" and, therefore, this makes them supranational and independent.

In accordance with the deontology of human rights, the particular nature of crimes committed in the former Yugoslavia and the requests coming from various associations, a high number of women will probably be included in the membership of the Court.

Even if targeted, the role of the various United Nations agencies in the criminal jurisdiction is such that the very United Nations supranational authority will be strengthened, and so too its democratic vocation, thus paving the way for a "high-profile" international criminal court.

The concurrent involvement of bodies operating within the framework of the Council of Europe will set the stage for a functional coordination with the United Nations and accelerate the process to push the latter towards the model of a genuine jurisdictional authority.

Paragraph 3 lists the criteria to be complied with by the entities that have to choose the 18 judges composing the Court, in order to ensure professionalism, impartiality and effective representation. While paragraph 4 deals with the election of the President, paragraph 5 explains how the Court will be organized in Chambers, in that a unified structure is not feasible. There will be a minimum number of Chambers (three), but the upper limit has not been decided yet and will depend on the amount of work to be concretely conducted.

The lower limit stems from the need to have at least a Chamber for preliminary inquiries, at least another Chamber for judgements of the first instance and at least a third one for appeals. To keep the structure as streamlined as possible, there will be three members when the case has to be judged by a single Chamber and seven when the Chambers join, as in the exceptional instances specified under articles 8 and 13.

Of course, in order for the Court to function, the United Nations should resort to special contributions by member States or by a group of member States (such as those belonging to the Conference on Security and Cooperation in Europe).

Article 9

The Prosecutor's Office

Paragraph 1 indicates the Prosecutor's Office's functions and paragraph 2 its organization and structure, which are similar to those indicated in the previous article, except for the number of attorneys that is two times as high. This is due to the need for them to work not only in the Court but also in the field for investigative purposes.

The role of non-governmental organizations in starting legal action is outlined in paragraphs 2 and 3.

Article 10

The Registry

The Registry is designed to support the Court and the Prosecutor's Office and therefore is organized into different offices and branches.

Article 11

Principles of proceedings

The procedural principles are designed to safeguard the defendant. Paragraph 1 lists the established principles set forth under article 6, section 3, of the European Convention on Human Rights and under article 14, section 3, of the United Nations Covenant on Civil and Political Rights of 1966. Subparagraph (a) also considers the problem of preventive detention; while the important right to have counsel is mentioned under subparagraph (e). Subparagraph (d) refers to the right to be present in court of the accused person hence the exclusion of judgements in default unless specifically accepted. Subparagraph (f) spells the right to have a skilled interpreter.

Paragraph 2 emphasizes the need to protect witnesses and victims against any form of intimidation and physical or psychological pressure.

Paragraph 3 entrusts the Court with the task of setting its own rules and of defining the procedure that will be followed by the judge and the parties throughout the proceedings, in line with the principles mentioned in the previous articles.

Article 12

Appeals

In compliance with a provision contained in article 14, section 5, of the United Nations Covenant on Civil and Political Rights of 1966, the defendant shall be entitled to lodge an appeal. This same right shall also be granted to the Prosecutor. Given the difficulties in creating an ad hoc Court of Appeal, the final judgement shall be made by a separate Chamber of the Court, other than those which acted at the first hearing.

Article 13

Res judicata and revision

Judgements against which no appeal is lodged and judgements delivered on appeal shall be considered final and become enforceable. They can however be challenged (revision) in the exceptional case in which some new evidence previously unknown at the time of the hearing comes to light and could acquit the defendant or could turn the crime into an offence not envisaged under articles 1 and 4. Under these circumstances, the judgement shall be made by the unified Chambers of the Court.

Article 14

Enforcement

For enforcement and precautionary measures, reference should be made to locus commissi delicti. Any possible different provision other than the ordinary ones falls within the competence of the Tribunal. In line with what is laid down in the preamble, it is up to the United Nations Security Council to ensure the best enforcement of the provisions laid down in this statute and particularly to enforce the sentences imposed by the Court when the State involved rejects the enforcement and tries to hamper the work of the enforcement bodies.

Needless to say, the nature of the measures adopted by the United Nations will have to be in line with the goals and principles of its Charter, as interpreted in the light of the international code of human rights.

Annex III

Composition of the Commission on War Crimes and Crimes against Humanity Committed in the Former Yugoslavia

- Prof. Giovanni Conso, Chairman, former President of the Italian Constitutional Court, Minister of Justice
- The Hon. Judge Carlo Russo, member of the European Court of Human Rights
- Ambassador Walter Gardini, former Director General for Political Affairs, member of the Board of Advisers, Legal Department, Ministry of Foreign Affairs
- Dr. Liliana Ferraro, Director General, Department for Criminal Law, Ministry of Justice
- Prof. Luigi Ferrari Bravo, Professor of European Communities Law at the University of Rome, Head of the Legal Department, Ministry of Foreign Affairs
- Prof. Paolo Ungari, Professor of History of Modern and Contemporary Law at LUISS University of Rome, and President of the Italian Commission on Human Rights
- Prof. Antonio Papisca, Professor of International Relations, University of Padua
- Prof. Giovanni Grasso, Professor of Criminal Law, University of Catania
- Prof. Cherif Bassiouni, Professor of Law, De Paul University of Chicago, President of the International Institute of Criminal Law, Siracuse

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